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Supreme Court, U.S.
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No. 03-1370

IN THE
SUPREME COURT OF THE UNITED STATES

TOWN OF NORWOOD AND THE
NORWOOD MUNICIPAL LIGHT DEPARTMENT,
Petitioners,

v.

NEW ENGLAND POWER COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

An electric power supplier filed a tariff amendment with the Federal Energy Regulatory Commission, setting forth a formula for calculating a termination charge to be imposed on customers seeking to terminate their long-term power supply contracts early.

The question presented is whether the utility may enforce the charge against the customer without obtaining the Commission's approval of its calculation of how the formula described in the tariff applies to that customer.

RULE 29.6 STATEMENT

New England Power Company is a wholly owned subsidiary of National Grid USA, which is a wholly owned indirect subsidiary of National Grid Transco plc, a United Kingdom-based company which has issued common stock to the public.

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STATEMENT OF THE CASE

This is a dispute over the charge that petitioner, the Town of Norwood, Massachusetts ("Norwood"), must pay for early termination of its long-term power purchase contract with respondent New England Power Company ("NEP"). The contract obligated Norwood to purchase its power requirements from NEP until at least October 31, 2008, and required it to give seven years' advance notice of termination. The contract also required Norwood to purchase power under NEP's tariff "as [it] may be amended from time to time." The Federal Energy Regulatory Commission approved a tariff filing by NEP, giving customers with such contracts the ability to terminate service early upon payment of a "contract termination charge" ("CTC"). This was part of an overall restructuring of the market to enable customers to seek competitive suppliers. *Town of Norwood, Mass. v. FERC*, 202 F.3d 392, 396-97 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000) (*Norwood I*).

The CTC was based on a formula measuring "the difference between the revenues that NEPCO would have received had the customer continued to take service for the applicable notice period (reduced by the portion of those revenues attributable to transmission costs) and the estimated market value of the power the customer would have received in that circumstance." Pet. App. 47a. The recovery provided by the tariff "is closely akin to contract damages." *Norwood I*, 202 F.3d at 400.

On March 4, 1998, Norwood unilaterally notified NEP that it was terminating its contract early, effective April 1, 1998, and switching to another supplier. Norwood took the position that it was justified in repudiating the contract, because certain other actions NEP had taken in connection

with market restructuring constituted a breach of contract (an issue Norwood was then litigating in federal district court). Subsequently, the district court dismissed Norwood's breach of contract claim, and the First Circuit affirmed. *Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 416-7 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000) (*Norwood II*)

After Norwood sent its termination letter, but before it became effective, NEP filed a tariff allowing customers to terminate early, contingent on paying the CTC. (Previously, there had been no mechanism to terminate early.) FERC approved the filing over Norwood's protest. *New England Power Co.*, 83 FERC ¶ 61,174 (1998). Norwood filed a petition for review with the First Circuit, which upheld FERC's order. *Norwood I.* The First Circuit rejected various challenges Norwood made to the CTC, including the contention that it discriminated in favor of NEP's affiliated wholesale customers.[1] The First Circuit also rejected Norwood's challenge based on "alleged problems with the contract termination charge calculation." *Id.* at 401. The First Circuit agreed with FERC that Norwood had not identified "a disputed issue regarding the termination charge calculation that necessitated a hearing." *Id.*

The First Circuit noted that FERC's initial order, issued May 15, 1998, had invited Norwood to file a complaint under section 206 of the Federal Power Act

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[1] The First Circuit noted that Norwood was offered the same settlement made available to NEP's affiliates, but instead chose to litigate. *Norwood I*, 202 F.3d at 401-2. The First Circuit concluded that "at least where a party has been offered the same settlement and refused it, a claim based simply on an abstract right to be treated the same as settling companies has much less force -- and to recognize it would subvert the public interest in promoting settlements." *Id.* at 402.

("Act"), 16 U.S.C. § 824e, if it wished to challenge the termination charge calculation. *Id.* The First Circuit -- nearly two years later -- commented that "presumably it can still do so." *Id.*

However, instead of proceeding under section 206 (which offers only prospective relief), Norwood sought a declaratory ruling from FERC that its contract with NEP expired October 31, 1998, its original expiration date. Had this challenge succeeded, it might have limited Norwood's termination charge liability to a period of seven months (April 1 – October 31, 1998). However, FERC ruled that Norwood itself had extended the contract to October 31, 2008, and the First Circuit denied review. *Town of Norwood, Mass. v. FERC*, 217 F.3d 24, 27 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2001) (*Norwood III*).

In the meantime, NEP had filed this suit in the Massachusetts Superior Court alleging that Norwood's failure to pay the CTC was a breach of its contract obligation to pay the charges due under NEP's tariff "as [it] may be amended from time to time." Pet. App. 11a. The complaint alleged that, as of the date the suit was filed (December, 1998), the accumulated charge was $4.5 million. Norwood made a variety of contentions in defense of the suit. However, the only additional challenge Norwood made to NEP's calculation under the CTC formula was to contend that NEP had used the wrong interest rate. Over two years later, when the Superior Court issued its decision holding Norwood liable for breach of contract, Pet. App. 9a-33a, Norwood still had not challenged NEP's calculation under the CTC formula (other than its interest rate contention) in the Superior Court. Nor had it filed any proceeding with FERC to challenge NEPCO's calculation, following the failure of its challenge to the October 31, 2008 contract expiration date.

In its decision granting summary judgment against Norwood on liability, the Superior Court noted that "Norwood has only argued that the CTC should be rejected *in toto*, and has not put forward any disputed facts as to the calculation of the charge." Pet. App. 32a n.15. Norwood responded with a motion to set the case for trial on the issue of damages, but the only issue it raised as to calculation of the CTC was the correct interest rate.[2] In its decision assessing damages for the CTC calculated through January 31, 2003, the Superior Court held that there was no "genuine issue of material fact as to the amount of damages," which it viewed as a "computational exercise" based on the monthly fee NEPCO had calculated. Pet. App. 8a.

In its brief before the Massachusetts Appeals Court, Norwood again did not raise any computational issue other than interest rate; instead, it argued that the trial court was required to hold a trial on issues outside the scope of the CTC.[3]

In December, 2002 -- over four years after FERC first suggested that it do so[4] -- Norwood finally filed a

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[2] Supplemental Appendix ("Supp. App.") at 1sa-7sa. In its brief on the motion, under the heading "NEP's Calculation of the Amount of the CTC Filed at FERC is Incorrect," the only issue Norwood raised pertinent to whether NEP had calculated the CTC correctly was the interest rate. *Id.* at 4sa-5sa, 8sa-9sa.

[3] In its appellate brief, Norwood argued that a trial on damages was required because 1) NEP failed to prove mitigation of damages, and "the CTC charge never took such mitigation into effect as is required under Massachusetts law"; 2) NEP did not sustain its burden of proving damages, and had none because Norwood paid for all power received under the contract and NEP had no reliance damage; and 3) NEP used the wrong interest rate. *Id.* at 10sa-13sa.

[4] *New England Power Co.*, 83 FERC ¶ 61,174, at 61,724 (1998).

petition with FERC under section 206 of the Federal Power Act. On July 2, 2003, FERC issued a ruling dismissing those portions of the petition which sought to re-litigate issues previously ruled on by FERC and the First Circuit, but setting for hearing five issues on the ground that, while the Commission had previously "accepted NEPCO's CTC formula," it "has not approved the way in which NEPCO has calculated the CTC" payable by Norwood under the formula. Pet. App. 51a, 52a.

The Commission's order established a "refund effective date" of February 21, 2003. Pet. App. 57a. Under section 206(b) of the Act, the Commission's jurisdiction to order refunds is limited to amounts paid for a "period subsequent to the refund effective date." 16 U.S.C. § 824e.

Norwood's attorney then wrote to the Massachusetts Appeals Court, arguing that "[t]he fact that FERC never approved the components of the CTC, unilaterally filed by NEP, makes it obvious that the amount of its CTC has no substance or value and that there is no support for NEP's $27 million claim." Pet. App. 59a.

The Appeals Court then affirmed the trial court's judgment. Pet. App. 1a-6a. It held the FERC Order was irrelevant, because "any relief granted [by FERC] will apply to rates charged after February 21, 2003," while NEP's complaint "seeks CTC charges accumulated through January 31, 2001." Pet. App. 5a n.6.

ARGUMENT

1. The CTC set forth in NEP's tariff filing was a formula, specifying how the contract termination charge would be calculated in the event a customer chose to

terminate its contract early. The Commission found NEP's filing to be "reasonable"[5] and so "accepted NEPCO's CTC formula." Pet. App. 51a. Under settled law, which this Court confirmed just last Term, that is a sufficient basis for the utility to charge rates in accordance with the formula, even if the Commission has not approved the utility's calculation of how the formula applies to particular customers. *Entergy Louisiana v. Louisiana Pub. Serv. Comm'n*, 123 S.Ct. 2050 (2003). The customer may challenge the utility's calculation, but the utility may properly seek enforcement of the charge without filing its calculation with FERC and obtaining FERC approval. In challenging the utility's ability to charge customers on the basis of a FERC-approved formula, the petition presents no novel issue, but instead seeks to revisit a recently decided question.

In *Entergy Louisiana v. Louisiana Pub. Serv. Comm'n*, this Court held that utilities' exercise of discretion within the parameters of the FERC-approved formula pre-empted any effort by state regulatory authorities to second-guess the utilities' formula calculation -- even where FERC had not reviewed or approved the calculation. In that case, allocation of certain system-wide costs to individual state utilities depended in part on classification of "ERS units." The FERC-filed tariff allowed an operating committee of utility representatives to classify the ERS units. The Court rejected a state commission's contention that it could review the prudence of the utilities' classification of these units and their resulting calculation of costs, where FERC had not reviewed and approved the utilities' action. As the Court explained: "It matters not whether FERC has spoken to the precise classification of ERS units, *but only whether the*

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[5] *New England Power Co.*, 83 FERC at 61,723.

FERC tariff dictates how and by whom that classification should be made. The amended system agreement clearly does so, and therefore the [State Commission's] second-guessing of the classification of ERS units is pre-empted." *Entergy*, 123 S.Ct. at 2057 (emphasis added).

That holding is in accord with previous rulings of the District of Columbia Circuit: "When the Commission accepts a formula rate as a filed rate, it grants waiver of the filing and notice requirements of section 205 of the Federal Power Act. . . . [The utility's] rates, then, can change repeatedly, without notice to the Commission, *provided* those changes are consistent with the formula." *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1567-68 (D.C. Cir. 1993) (quoting *San Diego Gas & Elec. Co. v. Alamito Co.*, 46 FERC ¶ 61,363, at 62,129-130 (1989)) (emphasis in original).

Norwood's position would require the Commission to approve not only the rate formula, but every particular application of the formula. But "[i]t can hardly be doubted at this late date that the Commission 'need not confine rates to specific, absolute numbers but may approve a tariff containing a rate 'formula' or a rate 'rule.'"" *Pub. Utils. Comm'n of California v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990)). "[B]ecause 'the formula itself is the rate, not the particular components of the formula, . . . periodic adjustments made in accordance with the Commission-approved formula do not constitute changes in the rate itself and accordingly do not require [§] 205 filings.'" *Id.*, 254 F.3d at 254, *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,544-45 (1994). Norwood has cited no authority for the proposition that FERC must approve both the formula and every calculation made under it. Indeed, "[t]he Commission has been accepting formula rates since the early 1970s." *Pub. Utils. Comm'n of California v.*

FERC, 254 F.3d at 254 (citing *Maine Yankee Atomic Power Co.*, 42 FERC ¶ 61,307, at 61,923 (1988)).

With the exception of *Entergy*, which is contrary to Norwood's position, none of the cases Norwood cites involved formula rates. In the case on which Norwood principally relies, a gas producer utility filed with FERC a contract specifying a fixed rate, which FERC approved. The contract also contained a "most-favored-nations" clause committing the purchaser to pay a higher rate if it bought gas from any other seller at a higher rate. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (*Arkla*). Unlike a formula rate, however, the higher rate would not go into effect automatically. Instead, it was conceded that the producer would have to amend its filing to specify the higher price but did not do so because the purchaser failed to tell it of the higher-price purchases. A state court held that the purchaser thereby breached the contract. The Supreme Court reversed, because in order to compute damages the state court had to speculate that the Commission would have found the higher rate just and reasonable if the purchaser had informed the utility and the utility had filed the higher rate. The Supreme Court concluded that "the Commission alone is empowered to make that judgment, and until it has done so, no rate other than the one on file may be charged." *Arkla*, 453 U.S. at 580-81.

Under a formula rate, however, "[t]he filed rate is the formula," and no further FERC ruling is required to implement charges calculated in conformance with it. *Blue Ridge Power Agency v. Appalachian Power Co.*, 58 FERC ¶ 61,193, at 61,598 (1992). Unlike the state court in *Arkla*, the courts below did not determine whether a rate approved by FERC is just and reasonable; they simply enforced the formula rate that FERC had approved, i.e., the CTC formula

in NEP's tariff. That is totally consistent with the filed rate doctrine.[6]

2. Norwood refers to the proceeding it belatedly filed with FERC under section 206 of the Act, challenging the CTC. It refers to the statement FERC made in that proceeding that it had not accepted NEP's calculations under the CTC formula. Pet. 9, Pet. App. 51a-52a. However, as pointed out previously, Norwood concedes that the CTC formula was accepted as part of the filed rate; the degree of "any affirmative approval or scrutiny by the agency" is irrelevant. *Norwood II,* 202 F.3d at 419. Likewise, whether or not FERC also accepted as part of the rate schedule NEP's application of the formula to calculate Norwood's CTC does not affect the applicability of the filed rate doctrine. *Entergy Louisiana v. Louisiana Pub. Serv. Comm'n*, 123 S.Ct. at 2057.

Norwood also cites prefiled staff testimony in the section 206 proceeding opining that the CTC should not exceed $9 million, rather than $78 million that the current CTC will reach if it runs through October, 2008. Pet. 12. The testimony excerpt quoted makes it apparent that the staff person arrived at the $9 million figure by considering factors not contained in the CTC formula that the Commission approved -- not by recalculating the appropriate charge under the formula. Pet. App. 69a-70a. The impropriety of relying on testimony in another (as yet uncompleted) proceeding is

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[6] *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951), is inapposite for the same reason. The relief sought in the district court in that case would have required the court to determine what rates were just and reasonable, a task within the exclusive jurisdiction of the Commission. 341 U.S. at 51-52. Here, by contrast, the trial court was merely asked to enforce the FERC-approved rate, not to determine whether that rate was just and reasonable.

underscored by the fact that the same witness has "corrected" her testimony and now opines that the "CTC cap" for Norwood should be $25.4 million, not $9 million. Supp. App. 14sa-17sa. The revised testimony, however, continues to rely on factors not contained in the current Commission-approved CTC formula.

In any event, whether or not the Commission adopts this staff person's views, the Commission's jurisdiction under section 206 is limited to determining, if it decides the present CTC is unjust and unreasonable, "the just and reasonable rate . . . to be *thereafter* observed." 16 U.S.C. §824e(b) (emphasis added); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). After Norwood filed its complaint under section 206, the Commission established a refund effective date of February 21, 2003, which was the earliest date permissible under section 206(b) (the refund effective date must be not earlier than 60 days after the complaint is filed). Pet. App. 57a. The Act restricts refunds to "the period subsequent to the refund effective date." 16 U.S.C. § 824e(b).[7] The judgment below is restricted to the CTC as accrued through January 31, 2001. Pet. App. 8a. The courts below were plainly correct in concluding that, under these facts, the section 206 proceeding could not affect this case.

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[7] Had Norwood filed its section 206 petition in May, 1998, when the Commission first suggested it do so, Norwood could have received a refund effective date in July, 1998, only four months after the CTC started to accrue -- at a time when the accrued charge would have been less than one-third what the Commission staff witness quoted by Norwood apparently thought the charge should be even before correcting her testimony.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL

APPENDICES

SUPPLEMENTAL APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

CIVIL ACTION NO. 98-2650A

NEW ENGLAND POWER COMPANY

v.

TOWN OF NORWOOD

EMERGENCY MOTION BY DEFENDANTS TOWN OF NORWOOD AND NORWOOD MUNICIPAL LIGHT PLANT FOR TRIAL ON ISSUE OF DAMAGES

As counsel for Norwood indicated at the February 26th hearing, the defendants, Town of Norwood, Massachusetts and Norwood Municipal Light Department ("NMLD"), respectfully request that this Court order a trial on the issue of damages in this case. The Court previously ruled that it has jurisdiction over New England Power Company's ("NEP") complaint and, in its decision of February 15, 2001, ruled that Norwood has breached its Power Contract with NEP dated April 11, 1983, under state law. While Norwood contests that decision and intends to appeal, even if such a breach occurred, NMLD is still entitled to a trial on damages and to discovery relating thereto.

The Court stated that its decision was based on rulings by the First Circuit Court of Appeals. The First Circuit ruled that FERC had not decided any contract matters and had left such matters up to the courts. *Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 416 (1st Cir. 2000)(*Norwood II*); *Town of Norwood v. FERC*, 202 F.3d 392, 400 (1st Cir. 2000).

Since the issue of whether the Power Contract had been breached by Norwood was clearly left to the jurisdiction of the courts, of necessity, that jurisdiction also includes the determination of contract damages relating thereto.

Even if NEP's CTC were somehow considered to be relevant to the determination of breach of contract damages by the court, it would at most only be a factor which the jury or court should consider in determining the damages. NEP's actions, even if not egregious enough to constitute a breach by NEP, certainly must be considered in any calculation of damages for a breach of contract by Norwood for non-payment. The major issues that must be resolved for the determination of contract damages include the following.[1]

1. **NEP had a duty to mitigate damages.**

Under contract law, damages should be reduced by any amount which could have reasonably been mitigated by the party seeking relief. Any extra power that NEP was no longer required to deliver to Norwood, placed a mitigation burden on NEP to seek to resell that power to

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[1] See affidavit of Malcolm McDonald attached hereto as Appendix A.

other entities. Norwood will establish that NEP has not suffered any damages because it has, in fact, resold the power to other parties. Also, NEP's filing of the CTC at a level twice as high as that NEP sought to charge its affiliates clearly violated its obligation to mitigate damages.

Plaintiff was under an obligation to mitigate damages, and cannot recover damages flowing from consequences which that party could reasonably have avoided. *See Hall v. Paine,* 224 Mass. 62, 65 (1916); *Degener v. Gray Lines,* 331 Mass. 133 (1954); *Anthony's Pier Four v. HBC Assoc.,* 411 Mass. 451, 455 (1991). As a rule, it is for the jury to determine whether the plaintiff could have lessened the injury it claims by the exercise of ordinary care and at reasonable expense. *See Degener v. Gray Lines*, 331 Mass. at 133-34; *Belkus v. City of Brockton,* 282 Mass. 285, 288 (1933).

2. <u>The CTC as structured precludes Norwood from being able to compete with NEP's affiliates</u>.

Norwood will show that the CTC filed against Norwood was over twice as high as the CTC that NEP filed for a voluntary agreement by its own distribution affiliates. This imposed on Norwood higher costs for its wholesale supply of power and on information and belief to preclude Norwood from competing on an equal playing field with NEP's affiliate distribution companies for retaining existing customers or attracting new customers. This anticompetitive attempt to damage Norwood as a competitor, is an improper basis for an award of damages.

3. NEP's calculation of the alleged amount claimed to be now owed is incorrect.

NEP's claim in its Supplemental Brief in "Support of Motion to Require Town of Norwood to Post Bond" dated February 23, 2001, that the Town of Norwood "now owes NEP for $27,149,054.08 as of January 31, 2001" is incorrect. The affidavit by Roger W. Pageau (as well as his previous affidavit of July 20, 2000) are based on calculations using an 18% interest rate (NEP Supp. Br. at 1, and fn 1 and 2). The applicable interest rate is not 18%. NEP's contract termination charge filed at the FERC specifies the following:

> ...the Customer's payments shall include carrying charges at the unpaid amount of the Contract Demand Charge at the interest rate determined pursuant to §35.19a of the Commission's regulation (18 C.F.R. §35.19a) effective on the Early Termination Date and compounded monthly.

The Commission's regulations at 18 C.F.R. §35.19a describe the following interest rate:

> (a)(2)(iii)(A)...the applicable average prime rate for each calendar quarter shall be the arithmetic mean to the nearest one-hundredth of one percent, of the prime rate values published in the *Federal Reserve Bulletin*, or in the Federal Reserve's "Selected Interest Rates" (Statistical Release G.13) for the fourth, third and second months, preceding the first month of the calendar quarter.
>
> (B) The interest required to be paid under

clause (iii)(A) shall be compounded quarterly.

4. **NEP has wrongfully sought to increase damages by retaining its rights to high cost nuclear power only applicable to Norwood.**

Norwood will establish that NEP, in the sale of its high cost nuclear entitlements, specifically designed a provision to retain costs to apply against Norwood, which would increase any damage calculation. Norwood will establish that this conduct was wrongful and, thus, should be disallowed as damages.

5. **NEP's damages should be limited to the profit that it would have received over and above its actual cost of serving Norwood.**

Since Norwood was committed under the contract to pay only for NEP's cost to serve plus a rate of return, the damages for breach of the contract would be limited to this amount. NEP's filed CTC far exceeds any lost profits from the contract.

6. **NEP is not entitled to collect more than its actual cost of service.**

This Court has ruled that the contract is based on Tariff No. 1 "which required that the rates would be based on NEP's actual cost of generating the electric power plus the actual costs in NEP's purchase power contract in addition to a regulated rate of return." Decision at 3. Since NEP has voluntarily sold all of its non-nuclear generating and purchase power contracts, it no longer has these costs as a

basis for its Tariff No. 1 service under the existing power contract. Norwood seeks to present evidence showing that NEP sold those facilities for a large profit --approximately $590,000,000 over and above its cost of the facilities sold. This profit over and above cost, as well as the cost of those facilities, has to be deducted from the previous Tariff No. 1 costs of service. NEP has applied those reduced costs to the CTC rates of its affiliates so that those CTC rates are less than half of the amount that NEP now seeks to bill Norwood under the CTC option it filed after Norwood had changed suppliers. As this Court recognizes in its decision, Tariff No. 1 cannot be based on costs that NEP no longer has, especially where NEP has made a substantial profit over those former costs in selling those facilities. See Decision at 3.

Furthermore, NEP, as part of its divestiture, has obtained the right to engage in the purchase and sale of electric power at unregulated market based rates. Its costs thereunder are relevant as to Norwood's damages for breach of contract.

7. The determination of damages requires resolution of factual issues by the jury.

In damage actions, as in all civil actions tried before a jury, the amount of such damages is for the jury to determine. 22 Am. Jur. 2d, Damages, § 980. This also includes mitigation issues. See id. § 981. The trial court may not grant summary judgment in a action for breach of contract against a defendant where there is a genuine issue of material fact concerning the sufficiency of plaintiff's attempt to mitigate damages. Id.; see also § 983.

CONCLUSION

For the above reasons, NMLD requests that the court set the issue of damages for trial before a jury after a reasonable period for discovery has been completed.

Respectfully submitted,

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March 1, 2001

SUPPLEMENTAL APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

CIVIL ACTION NO. 98-2650A

NEW ENGLAND POWER COMPANY

V.

TOWN OF NORWOOD, MASSACHUSETTS
AND NORWOOD MUNICIPAL LIGHT DEPARTMENT

REPLY BY TOWN OF NORWOOD AND NORWOOD MUNICIPAL LIGHT DEPARTMENT TO NEW ENGLAND POWER COMPANY'S OPPOSITION TO EMERGENCY MOTION BY DEFENDANTS FOR A TRIAL ON THE ISSUE OF DAMAGES
(EXCERPT – PAGES 9-10)

III. NEP'S CALCULATION OF THE AMOUNT OF THE CTC FILED AT FERC IS INCORRECT

NEP's insistence that it can apply an 18% interest rate to FERC's CTC is simply wrong and NEP can point to no order of the FERC supporting its position. The express language of NEP's CTC provides that: ". . . the customer's payment shall include carrying charges at the unpaid amount of the Contract Demand charge at the interest rate determined pursuant to § 35.19a of the Commission's regulation (18 C.F.R. § 35.19a)." Since there is a dispute of

fact as to the applicable rate between NEP's affidavits and those submitted by the Town of Norwood, this requires a trial.[6]

Under the *PanAmerican* case, *supra*, NEP has no right to enforce any federal legal remedies in the state court. Accordingly, under the sections of FERC's Tariff Number 1, Schedule I, NEP has no remedy for 18% damages, if that section somehow applies even when no power has been delivered by NEP.

It is clear that NEP, having elected to pursue a breach of contract issue against Norwood in the Superior Court, is bound to be governed by the principles of Massachusetts law relating to the determination of damages for breach of contract.

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[6] The tariff schedules submitted by NEP in support of its contention, namely Tariff Number 1, Schedule 1, do not include the complete tariff, which makes it clear that the interest rates cited by NEP thereunder only apply to bills for actual power service that NEP has supplied to a customer. The full text of Tariff Number 1, Schedule I, is enclosed as an addendum to this reply, which consists of the "General Terms and Conditions" of NEP's Tariff Number 1.

SUPPLEMENTAL APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

CASE NO. 2001-P-1467

NEW ENGLAND POWER COMPANY

v.

TOWN OF NORWOOD AND NORWOOD MUNICIPAL LIGHT DEPARTMENT

ON APPEAL FROM A JUDGEMENT OF THE WORCESTER COUNTY SUPERIOR COURT

BRIEF FOR THE DEFENDANTS-APPELLANTS TOWN OF NORWOOD AND NORWOOD MUNICIPAL LIGHT DEPARTMENT
(EXCERPT – PAGES 35-38)

III. THE COURT BELOW COMMITTED LEGAL ERROR BY REFUSING TO PERMIT A TRIAL ON DAMAGES.

As established in Argument I, the CTC does not apply here. At most, NEP is entitled to contract damages under Massachusetts law. Even if NEP could demonstrate a Norwood breach, the Court is confused about damages:

> Under this theory, then, Norwood would be liable to NEP for damages in contract for the unexpired portion of the Contract, less any

> mitigation of damages, such as avoided costs of production, much like the contract termination charge (App. 1045).

That is precisely the point. Contract damages are fundamentally different from the CTC. Norwood is still awaiting an opportunity to show that the CTC formula is, in fact, far more draconian than contract damages.[8] The CTC formula is based on the lost revenues under the Contract and premised on the supplier owning generation (which NEP does not) and having operation and maintenance expenses and fuel charge expenses.

By contrast, damages would be based on lost profits, a much smaller amount than any non-applicable lost revenues. In fact, NEP sold the very plants and power contracts that were used to provide power to Norwood for over $1 billion dollars. See New England Power Co., 82 FERC ¶61,179, at 61,656 (1998). However, the CTC charge never took such mitigation into effect as is required under Massachusetts law. F.E. Atteaux & Co. v. Mechling Bros. Manufacturing Co., 245 Mass. 483, 499 (1923); Hall v. Paine, 224 Mass. 62, 65 (1906).

A. NEP has the Burden to Prove Damages.

It is axiomatic that the plaintiff must prove each element of its case in order to prevail; in an action for breach of contract, the plaintiff must show that it was

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[8] Even NEP appears to have envisioned a damages trial. See ¶2 of its Prayers for Relief (App. 12). See also ¶13 of its Complaint (App. 10) in which even NEP describes the CTC as designed to "...compensate NEP for the damages resulting from Norwood's premature termination of its contract." (emphasis supplied).

damaged by the breach. See Singarella v. City of Boston, 342 Mass. 385, 387 (1961). Provided the plaintiff can prove that it was damaged, it must also prove the extent of damages. Eastern Advertising Co. v. Shapiro, 263 Mass. 228, 232 (1928); D. O. Haynes & Co. v. Nye, 185 Mass. 507, 509 (1904). If the plaintiff is unable to prove any damages resulting from the breach of contract, it is entitled to only nominal damages. St. Charles v. Kender, 38 Mass.App.Ct. 155, 161 (1995); Rombola v. Cosindas, 351 Mass. 382, 384 (1966).

Here, NEP never delivered any power to Norwood for which NEP did not receive payment. NEP has never had to prove that one penny of the $27 million constitutes some form of "reliance damages". The failure to prove any damages is tantamount to the failure to make a case of breach of contract.

B. NEP Had A Duty To Mitigate Damages.

Under contract law, damages should be reduced by any amount which could have been reasonably mitigated by the party seeking relief. Any power NEP was no longer required to deliver to Norwood, placed a mitigation burden on NEP to seek to resell that power to other entities. If provided the opportunity, Norwood will establish that NEP has not suffered any damages because NEP has, in fact, in many cases, resold the power to another party at prices exceeding the price in Norwood's Contract. NEP was under an obligation to mitigate damages, and cannot recover damages flowing from consequences which that party could reasonably have avoided. See Hall v. Paine, 224 Mass. 62, 65 (1916); Degener v. Gray Lines, 331 Mass. 133 (1954); Anthony's Pier Four v. HBC Assoc., 411 Mass. 451, 455 (1991). It is for the jury to determine whether the plaintiff could have lessened the injury it claims by the exercise of

ordinary care and at reasonable expense. See Degener v. Gray Lines, 331 Mass. at 133-34; Belkus v. City of Brockton, 282 Mass. 285, 288 (1933).

C. The Applicable Interest Rate Is Not 18%.

If the CTC somehow applied, NEP's interest rate is wrong. NEP's claim, in its Supplemental Brief in Support of Motion to Require Town of Norwood to Post Bond dated February 23, 2001, that the Town of Norwood "owes [NEP] the amount of $27,149,054.08 as of January 31, 2001" is incorrect (App. 1047). NEP's contract termination charge filed at the FERC specifies the following:

> . . . the Customer's payments shall include carrying charges at the unpaid amount of the Contract Termination Charge at the interest rate determined pursuant to Section 35.19a of the Commission's regulations (18 C.F.R. §35.19a) effective on the Early Termination Date and compounded monthly . . .(App. 559).

The Commission's regulations at 18 C.F.R. §35.19a describe the interest rate as the prime rate.

In its constant effort to squeeze more from Norwood's ratepayers, NEP argued below - and the Court erroneously agreed - that Tariff Section J "Billings and Payment" controls. That section only applies where power is sold and not to the CTC.

SUPPLEMENTAL APPENDIX D

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. EL03-37-000, EL03-37-001

TOWN OF NORWOOD, MASSACHUSETTS

v.

NATIONAL GRID USA
NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS ELECTRIC COMPANY AND NARRAGANSETT ELECTRIC LIGHT COMPANY

EXHIBIT S-10,
SURREBUTTAL TESTIMONY OF WENDELIN W. WHITFIELD
WITNESS FOR THE STAFF OF THE FEDERAL ENERGY REGULATORY COMMISSION
(FILED APRIL 5, 2004)

Q. PLEASE SUMMARIZE YOUR SURREBUTTAL TESTIMONY.

A. This testimony explains the need to correct Staff's CTC cap calculation based on new data provided with the Respondents' answering testimony. The new data indicates that all post-divestiture fixed costs were not included in Staff Exhibit S-2, page 23. Thus, the CTC cap applicable to Norwood previously calculated as $9.0 million should be $25.4 million (Exhibit S-12). Ms. Whitfield explains why she switches from pre-divestiture to post-divestiture data

also provided by the Respondents with the filing on March 9, 2004. Finally, Ms. Whitfield states that this testimony will ensure that the decision-makers have before them Staff's best estimate of the loss involved in this proceeding.

Q. ARE YOU THE SAME WENDELIN W. WHITFIELD WHO PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?

A. My purpose is to explain corrections to Staff's CTC cap calculation based on new data provided by Respondents' witness Terry L. Schwennesen in Exhibits NEP-27 and NEP-35. My use of costs labeled "Fixed Component" from the pre-divestiture estimates provided in Docket No. ER97-678-000 omitted estimated fixed costs labeled "Variable Component." The cap reflected in Staff Exhibit No. S-2 , page 23 thus excludes some of NEPCO's fixed power supply costs. (See Exhibit NEP-27, at page 2, line 19.) The Company admits that there was no indication in the NEPCO settlement sheets previously used that fixed costs were partially allocated to the *variable* component. (See the response to Staff Data Request S/Nat.Grid-5.32 at Exhibit S-11.) Further, Ms. Schwennesen points out that NEPCO estimated its remaining fixed power supply costs after the divestiture transaction, and she provides this information in Exhibit NEP-35 under the Post-Divestiture Basis column. Therefore, my revised fixed costs estimate from Docket No. EC98-1-000 (the divestiture proceeding) more accurately reflects fixed costs than my original estimate. I am therefore submitting a revised calculation of the Norwood CTC cap

adopting a post-divestiture basis rather than a pre-divestiture basis.

Q. ARE YOU SPONSORING ANY EXHIBITS IN CONNECTION WITH THIS TESTIMONY?

A. Yes. In addition to Exhibits S-10 (this testimony) and S-11 (the data response), I am sponsoring Exhibits S-12, S-13, S-14 and S-15. Exhibit S-12 contains my revised cap calculation based on the post-divestiture data provided by National Grid's witness in Exhibit NEP-35, which is also included for convenience as Exhibit S-13. Exhibit S-14 contains a corrected version of Exhibit S-2, page 23, which updates fixed costs to include those reflected in the variable component. Exhibit S-15 contains a chart comparing Staff CTC calculations and summarizing the differences.

Q. PLEASE FURTHER DESCRIBE EXHIBIT S-12, AS THIS REPRESENTS STAFF'S REVISED POSITION ON THE APPROPRIATE CTC CAP.

A. This exhibit more accurately reflects fixed costs. It thus revises the CTC cap applicable to Norwood from $9.0 million to $25.4 million. This value was developed by applying Norwood's load percentage to the total calculated remaining fixed costs after NEPCO's divestiture of non-nuclear generating assets, and using present value analysis for the remaining contract obligation period ending October 31, 2008. As noted in the comparison chart, Exhibit 15, if I had estimated the non-nuclear fixed costs lower, the results of my adjusted pre-divestiture method (Exhibit S-2, page 23) would have closer matched my revised calculation. This provides me with a higher degree of confidence in the new calculation of the appropriate CTC cap for Norwood.

Q. WHY DO YOU BELIEVE IT IS IMPORTANT TO FILE THIS SURREBUTTAL TESTIMONY?

A. This testimony and the associated exhibits are needed to correct for erroneous exclusion of "variable" fixed costs in my cap estimate, which led me to underestimate the cap. Also, this testimony will ensure that the decision-makers have before them Staff's best estimate of the loss involved in this proceeding.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.